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Supreme Court, U.S.
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No. 04-1146

In The
Supreme Court of the United States

JEFFREY BUBNA,

Petitioner,

v.

ANCHORAGE EQUAL RIGHTS COMMISSION, MUNICIPALITY OF ANCHORAGE, PAULA HALEY in her official capacity as the Executive Director of the Alaska State Commission for Human Rights,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of The State Of Alaska

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. A Ninth Circuit en banc panel ruled that two of the three plaintiffs in this case did not have Article III standing in an earlier federal case raising the same issues presented here. The third plaintiff, who did not participate in the earlier case but who is virtually identical to the other two, joined them in this state court case. He alone has filed the petition for certiorari. Does this petitioner have Article III standing?

2. The plaintiffs raised Federal Constitutional issues in this state court case. The Alaska Supreme Court had already decided these issues in a similar case in 1994. The plaintiffs asked the Alaska Supreme Court to overrule that case, but the court declined, relying on its state law test of whether to reconsider an earlier governing case. The opinion decides only this state law issue. Does this case present a federal issue over which this Court has jurisdiction?

3. The petitioner argues that the Alaska Supreme Court decision below conflicts with decisions of this and other courts on certain Federal Constitutional issues. The Alaska Supreme Court did not rule on any of these issues however; it only applied a state law test and decided not to reconsider a 1994 state case that decided these issues. Does the Alaska Supreme Court case below conflict with decisions from any other courts?

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STATUTES

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STATEMENT OF FACTS AND PROCEEDINGS

The petition for certiorari in this case is part of a decade-long attempt by several landlords to have a decision of the Alaska Supreme Court overruled. These landlords seek a declaration that the state and municipal housing laws that prohibit discrimination based on marital status are unconstitutional. App. 4-5. They argue that because their religion considers cohabitation without marriage to be a sin, renting their commercial properties to such couples forces them to commit sin themselves, which violates their rights to free exercise of religion and free speech. App. 4-6.

The landlords seek reversal of the Alaska Supreme Court's decision in *Swanner* v. *Anchorage Equal Rights Com'n*, 874 P.2d 274 (Alaska 1994). In *Swanner*, the court rejected a constitutional challenge to the same statutory provisions brought by Anchorage landlord Tom Swanner. Swanner had a policy of refusing to rent or show property to unmarried couples, based on his Christian religious beliefs. *Id.* at 276-77. After receiving complaints against Swanner, the Anchorage Equal Rights Commission filed proceedings against him and ultimately found that he had engaged in discriminatory conduct. *Id.* at 277. Swanner appealed, asserting that the state and municipal anti-discrimination laws violated his rights to the free exercise of his religion under the United States and Alaska Constitutions. *Id.*

The Alaska Supreme Court found no merit to these claims under either constitution. Applying the test set out by this Court in *Employment Division, Department of Human Resources* v. *Smith*, 494 U.S. 872 (1990), the court concluded that Swanner's federal constitutional rights had

not been violated, since the challenged anti-discrimination laws are neutral and generally applicable provisions. 874 P.2d at 279-80. The court also applied the more protective requirements of *Sherbert* v. *Verner*, 374 U.S. 398 (1963), which it had previously adopted as a state constitutional measure. *Id.* at 281-82. The court concluded that the challenged laws passed constitutional muster because they furthered a compelling state interest by preventing marital status discrimination, and were narrowly tailored. *Id.* at 282-83. Relying on the same conclusion, the court separately held that the disputed laws would withstand federal review under the strict scrutiny test that Congress had recently enacted in the Religious Freedom Restoration Act of 1993.[1] *Id.* at 280 n.9. This Court declined to review *Swanner* on a writ of certiorari. *Swanner* v. *Anchorage Equal Rights Com'n*, 513 U.S. 979 (1994).

Shortly after the Alaska Supreme Court decided *Swanner*, landlords Kevin Thomas and Joyce Baker filed suit in the United States District Court in Anchorage against Paula Haley in her capacity as the Executive Director of the Alaska State Commission for Human Rights, the Anchorage Equal Rights Commission, and the Municipality of Anchorage. *See Thomas* v. *Anchorage Equal Rights Com'n*, 220 F.3d 1134, 1138 (9th Cir. 2000) (en banc). They asserted that the Alaska and Anchorage anti-marital discrimination laws violated their free exercise rights under the United States Constitution, and sought a declaratory judgment enjoining the state and the municipality from enforcing those provisions. *Id.* Thomas

[1] This Court later found the Religious Freedom Restoration Act to be unconstitutional in *City of Boerne* v. *Flores*, 521 U.S. 507 (1997).

and Baker are Anchorage landlords whose "situation is nearly indistinguishable from the one [the court] considered in *Swanner*." *Thomas* v. *Anchorage Equal Rights Com'n*, 102 P.3d 937, 945 (Alaska 2004).

The federal district court granted summary judgment to the landlords, declaring that the state and municipal prohibitions of marital discrimination violated their free exercise rights. *See id.* at 941. A divided panel of the Ninth Circuit affirmed this ruling, but the court subsequently granted rehearing en banc and withdrew the panel's opinion. *See Thomas* v. *Anchorage Equal Rights Com'n*, 165 F.3d 692, 697, *withdrawn and reh'g en banc granted*, 192 F.3d 1208 (9th Cir. 1999) ("*Thomas I*"). After rehearing the case, the en banc court vacated the judgment and ordered the landlords' action dismissed. Describing the action as "a case in search of a controversy," the court ruled that the landlords' constitutional claims should not have been decided on their merits because the action was not ripe for judicial review. *Thomas* v. *Anchorage Equal Rights Com'n*, 220 F.3d at 1137-38 ("*Thomas II*"). This Court denied certiorari. *Thomas* v. *Anchorage Equal Rights Com'n*, 531 U.S. 1143 (2001).

Joined by another similarly-situated Anchorage landlord, Jeffrey Bubna, Thomas and Baker refiled their case in the Alaska Superior Court, naming the same defendants. *See Thomas*, 102 P.3d at 942 ("*Thomas III*"). Their case asserted essentially the same violation of free exercise rights that Thomas and Baker had raised in the preceding federal action. *Id.* The landlords also alleged independent violations of their constitutional rights to free speech, and asked the court to overrule the *Swanner* decision. *Id.*; App. 12.

Ruling on cross-motions for summary judgment, the superior court rejected the landlords' claims. *Id.* The Alaska Supreme Court affirmed. The court applied *Swanner* to deny their requested relief under the common law principle of stare decisis. *Id.* at 943. The court considered whether the landlords met the "heavy threshold burden of showing compelling reasons for reconsidering the prior ruling," stating that it will overrule a prior decision "only when clearly convinced that the rule was originally erroneous or is no longer sound because of changed conditions, and that more good than harm would result from a departure from precedent." *Id.* The court carefully examined each element of this standard, and held that while the landlords "strenuously criticize *Swanner's* reasoning and holding in many respects, [they] do not convincingly show good cause to revisit this precedent." *Id.*

The landlords made free speech arguments in addition to their free exercise claims, but the Alaska Supreme Court held that the free speech arguments lacked independent merit. *Id.* at 945. Because the prohibited speech was a limitation on commercial speech preliminary to real estate transactions, prohibiting speech intended to discriminate would violate free speech rights only if prohibiting the underlying discrimination violated free exercise rights, a point that the landlords conceded. *Id.* & n.43. Therefore, since *Swanner* had already found that the laws did not violate the free exercise rights of a "virtually identical landlord," *id.* at 943, the free speech claims could prevail only if the court overruled that decision.

Because landlords Baker and Thomas are bound by the Ninth Circuit's determination that they have no Article III standing to bring these claims, they have not

joined with Bubna in filing the petition for certiorari in this case. Pet. at *ii* n.1.

REASONS FOR DENYING THE WRIT

This Court has no jurisdiction to decide the issues the petitioner asks it to consider. Two of the plaintiffs who brought this case are bound by a Ninth Circuit decision that they have no standing to bring these claims to a federal court; that is why Petitioner Bubna joined them in filing this case and alone petitions for certiorari. But Mr. Bubna has no better case for Article III standing than the two others had. Further, the Alaska Supreme Court based its decision solely on state law, so it is beyond this Court's jurisdiction to review, and it presents no conflict with other courts on federal issues.

I. The Petitioner in this Case Has Not Presented a Ripe Controversy Under Article III.

Although the Alaska Supreme Court found that the landlords have standing under its lenient state standards, *Thomas III*, 102 P.2d at 942, an en banc panel of the Court of Appeals for the Ninth Circuit had already determined that two of the three landlords did not meet the jurisdictional requirements of Article III, a decision that this Court declined to review. *Thomas II*, 220 F.3d at 1137-38, *cert. denied*, 531 U.S. 1143 (2001).

Kevin Thomas and Joyce Baker have previously challenged in federal court the same state and municipal laws at issue here. Claiming that the laws' prohibition on discrimination conflicts with their religious beliefs, they asked the federal court to enjoin the state and city from

ever enforcing the laws against them. *See Thomas I*, 165 F.3d at 697. Ruling that the landlords' constitutional claims should not have been decided on their merits, since the action was not ripe for judicial review, an en banc panel of the Ninth Circuit ordered the landlords' action dismissed. *Thomas II*, 220 F.3d at 1142.

While Petitioner Jeffrey Bubna did not participate in the federal court case, his claim is insufficient to invoke Article III jurisdiction for the same reasons the claims of the original plaintiffs were. Because he stands in the same position as Thomas and Baker, his claims would have been "dismissed at the outset" if the federal rules of justiciability applied in state court. *ASARCO Inc.* v. *Kadish*, 490 U.S. 605, 617 (1989).

Like Thomas and Baker, Bubna is a landlord who has challenged Alaska's anti-discrimination law based on a First Amendment free exercise of religion and free speech claim. App. 2, 4. Like Thomas and Baker, Bubna has not alleged that any prospective tenant has ever filed a complaint against him. *See* App. 1-16. Like Thomas and Baker, Bubna has not alleged that either the Alaska State Commission for Human Rights or the Anchorage Equal Rights Commission has ever initiated an investigation into his rental practices or commenced a civil enforcement action or criminal prosecution against him under the challenged laws. *Id.* As the Ninth Circuit en banc panel stated, "at this point the dispute is purely hypothetical and the injury is speculative." *Thomas II*, 220 F.3d at 1137.

Having been a landlord for 15 years without interference from the government, Bubna presents no ripe issue, and simply seeks an advisory opinion that the Alaska

Supreme Court erred in its decision in the *Swanner* case a decade ago, and that it erred in refusing to overrule *Swanner* in this case.

II. The Alaska Supreme Court Decided the Issue Presented in this Case Not as a Matter Of Federal Law, But Rather as a Matter Of State Law That This Court Has No Power To Review.

The landlords in this case challenged the state and municipal laws as violating their right to freely exercise their religion, but the Alaska Supreme Court had already rejected that challenge in *Swanner*. For that reason, in this case the Alaska Supreme Court based its decision only on its analysis of whether the case presented sufficient bases to reconsider *Swanner*. This inquiry is purely a matter of state law.

This Court does not review determinations of state law on appeals from state courts, since interpretations of state law by a state's highest court are binding upon the Court. *O'Brien* v. *Skinner*, 414 U.S. 524, 531 (1974). The Alaska Supreme Court did not consider any federal rights in its decision; it evaluated only whether the landlords' arguments were sufficient, under a state common law standard, to overrule an earlier decision. *See Thomas III*, 102 P.3d at 943 ("We will overrule a prior decision only when clearly convinced that the rule was originally erroneous or is no longer sound because of changed conditions, and that more good than harm would result from a departure from precedent." (quoting *State, Commercial Fisheries Entry Com'n* v. *Carlson*, 65 P.3d 851, 859 (Alaska 2003)).

The petitioner seeks, in essence, to have this Court review the substance of the Alaska Supreme Court's decision issued 11 years ago. But since the Alaska Supreme Court refused to revisit the issues it decided in *Swanner*, this case does not present those matters for this Court's review. This Court cannot reverse the Alaska Supreme Court's decision not to reconsider the merits of *Swanner* because that is a matter of state law, and it cannot consider in this case whether the Alaska Supreme Court should have struck down the anti-discrimination laws in 1994, because *Swanner* became final when this court denied certiorari a decade ago. The petition therefore presents no issue of federal law for this Court to review.

III. This Case Creates No Conflict with Decisions of this Court, Federal Circuit Courts, or State Supreme Courts on the Application of *Smith* And *Lukumi*.

The petitioner argues that there is substantial disagreement among federal Circuit Courts and state supreme courts regarding the correct meaning and application of *Employment Division* v. *Smith,* 494 U.S. 872, and *Church of the Lukumi Babula Aye, Inc.* v. *Hialeah*, 508 U.S. 520 (1993), and the general applicability and "hybrid rights" doctrines. Pet. at 20. Regardless of whether that is correct, the Alaska Supreme Court's decision in this case does not create a conflict with any of these courts, nor does it conflict with any decision of this Court.

This is because the Alaska Supreme Court did not decide in this case that the law is generally applicable and neutral, or that landlords challenging this statute did or did not present hybrid claims. Those are determinations

that the Alaska court made in 1994 in the *Swanner* case. 874 P.2d 274. This case cannot conflict with federal cases on matters that the court did not even address below.

Moreover, even *Swanner* does not conflict with those decisions. The Alaska court correctly held in *Swanner* that the law is generally applicable and neutral toward religion. *Id.* at 279-280. It applies equally to all landlords regardless of their religious beliefs. *See* AS 18.80.240(1), (2), (3), and (5).[2] Its purpose is to eliminate discriminatory

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[2] AS 18.80.240(1), (2), (3), and (5) provide:

It is unlawful for the owner, lessee, manager, or other person having the right to sell, lease, or rent real property

(1) to refuse to sell, lease, or rent the real property to a person because of sex, marital status, changes in marital status, pregnancy, race, religion, physical or mental disability, color, or national origin; however, nothing in this paragraph prohibits the sale, lease, or rental of classes of real property commonly known as housing for "singles" or "married couples" only;

(2) to discriminate against a person because of sex, marital status, changes in marital status, pregnancy, race, religion, physical or mental disability, color, or national origin in a term, condition, or privilege relating to the use, sale, lease, or rental of real property; however, nothing in this paragraph prohibits the sale, lease, or rental of classes of real property commonly known as housing for "singles" or "married couples" only;

(3) to make a written or oral inquiry or record of the sex, marital status, changes in marital status, race, religion, physical or mental disability, color, or national origin of a person seeking to buy, lease, or rent real property;

. . .

(5) to represent to a person that real property is not available for inspection, sale, rental, or lease when in fact it is so available, or to refuse to allow a person to inspect real property because of the race, religion, physical or mental disability, color, national origin, age, sex, marital status,

(Continued on following page)

practices in the housing rental market, not to target or suppress religious beliefs. *See Swanner*, 874 P.2d at 282. Under *Smith*, the landlords are not excused from compliance with Alaska's anti-discrimination law simply because it conflicts with practices based on their religious beliefs. This Court rejected this argument in *Smith*, because "[t]o permit this would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself." 494 U.S. at 879 (quoting *Reynolds* v. *United States*, 98 U.S. 145, 166-67 (1879)).

The landlords argue that the exceptions in the law for married-only or singles-only housing somehow "devalue [the landlords'] religious conviction." Pet. at 15. The exceptions are applicable to all landlords, however, regardless of their religious beliefs or motivation. Moreover, not only are the exceptions neutral toward religion, they could actually *resolve* the landlords' concerns about renting to unmarried couples. If the landlords were to take advantage of the exception for married-only housing, they could designate their rental property as available only to married couples and easily follow the dictates of their religious beliefs without violating the law. *See Thomas III*, 102 P.3d at 945 ("The landlords do not assert that their religious beliefs compel them to rent to classes of tenants other than "singles only" or "married couples"; nor do they satisfactorily explain why they could not take advantage of this exception to mitigate any financial hardship they might otherwise experience by complying with the anti-discrimination provision.")

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change in marital status or pregnancy of that person or of any person associated with that person[.]

The landlords' claim that *Thomas III* conflicts on the "hybrid" issue also is incorrect. In *Employment Division* v. *Smith*, this Court provided that courts may exempt an individual from compliance with neutral laws of general applicability where the facts present a hybrid situation where a constitutionally protected right is implicated in addition to free exercise of religion. 494 U.S. at 881-82. The Alaska court's decision could not conflict with *Smith* or any other decision about hybrid claims, because it did not rule on hybrid claims in this case. In *Swanner*, the Alaska court acknowledged that while *Smith* had suggested an exception for hybrid claims, the landlord, Tom Swanner, did not allege a hybrid violation. *Swanner*, 874 P.2d at 280. And in this case, the Alaska court refused to reconsider *Swanner* because the landlords had failed to show that *Swanner* would have been decided differently if the landlord in that case *had* argued the hybrid theory. *Thomas III*, 102 P.3d at 943-44. This is particularly true in light of *Swanner*'s holding that compelling state interests supported the narrowly-tailored prohibition on discrimination. *Swanner*, 874 P.2d at 280-83 & n.9.

CONCLUSION

For the foregoing reasons, the Court should deny the petition.

Respectfully submitted,

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IN THE SUPERIOR COURT
FOR THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT AT ANCHORAGE

KEVIN THOMAS, JOYCE BAKER, and JEFFREY BUBNA, Plaintiffs, v. ANCHORAGE EQUAL RIGHTS COMMISSION; the MUNICIPALITY OF ANCHORAGE; and PAULA HALEY in her Official Capacity as the Executive Director of the ALASKA STATE COMMISSION FOR HUMAN RIGHTS, Defendants.	)	Case No. 3AN-01-7003 Civil

FIRST AMENDED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

COME NOW the Plaintiffs, Kevin Thomas, Joyce Baker, and Jeffrey Bubna, by and through their attorneys, Brena, Bell & Clarkson, P.C., and for their First Amended causes of action against the Defendants, Anchorage Equal Rights Commission, the Municipality of Anchorage, and Paula Haley in her Official Capacity as the Executive

Director of the Alaska State Commission for Human Rights, allege as follows:

PARTIES/JURISDICTION/VENUE

1. Plaintiff, Kevin Thomas ("Thomas"), is a resident of the State of Alaska and has conducted business in Anchorage, Alaska, as a residential landlord for a period of thirteen (13) years. Thomas owns residential rental properties in Anchorage, Alaska, which he rents to residential tenants. Thomas, who has both interest injury standing and citizen taxpayer standing to raise the claims in this action, is in all other ways qualified to maintain this action.

2. Plaintiff, Joyce Baker ("Baker"), is a resident of the State of Alaska, and together with her husband conducts business in Anchorage, Alaska, as a residential landlord. Baker owns a total of four (4) residential rental properties in Anchorage, Alaska, which she and her husband rent to residential tenants. Baker who has both interest injury standing and citizen taxpayer standing to raise the claims in this action, is in all other ways qualified to maintain this action.

3. Plaintiff, Jeffrey Bubna ("Bubna"), is a resident of the State of Alaska, and together with his wife conducts business in Anchorage, Alaska as a residential landlord. Bubna owns a total of two (2) rental buildings with four (4) rental units, and maintains his personal residence with his wife and children in one of the buildings. Bubna has been in the residential rental business in Anchorage since approximately 1989. Bubna, who has both interest injury standing and citizen taxpayer standing to raise the claims

in this action, is in all other ways qualified to maintain this action.

4. Defendant Anchorage Equal Rights Commission ("AERC") is a local human rights commission which was established and is maintained by the Municipality of Anchorage, Alaska, in accordance with AS 18.80.290. AERC is, and at all times relevant to the allegations stated in this complaint was, charged with the duty and responsibility of enforcing, and did act to enforce, Anchorage Municipal Ordinances regarding civil rights, including but not limited to, AMC 5.20.020. AERC also, pursuant to a work share agreement with the Alaska State Commission for Human Rights, acts to enforce, and at all times relevant to the allegations stated in this complaint acted to enforce Alaska Statutes regarding human rights, including but not limited to, AS 18.80.240. AERC is amenable to suit pursuant to AS 22.10.020(c) and (g) and 28 U.S.C. § 1983, and is subject to the jurisdiction of this Court.

5. Defendant Municipality of Anchorage ("MOA") is a Unified Home Rule Municipality organized and existing pursuant to Title 49 of the Alaska Statutes. MOA is amenable to suit pursuant to AS 22.10.020(c) and (g) and 28 U.S.C. § 1983, and is subject to the jurisdiction of this Court.

6. Defendant Paula Haley ("Haley") is, and at all times relevant to the allegations contained in this complaint was, the Executive Director of the Alaska State Commission for Human Rights ("Commission"). Haley is, and at all times relevant to the allegations contained in this action was, charged with the duty and responsibility to manage and direct the Commission to enforce Alaska

Statutes regarding Human Rights, including but not limited to, AS 18.80.240. The Commission, under Haley's management and direction, and pursuant to a work share agreement with AERC, sometimes refers enforcement of Alaska Statutes regarding human rights in the greater Anchorage area to the AERC. At all times relevant to the allegations contained in this complaint, Haley acts, acted, and was acting in her official capacity as the Executive Director of the Commission. The Commission is statutorily and judicially mandated to enforce the laws at issue in this case and to seek out and eradicate, without the filing of any tenant complaint, (a) the religiously motivated discrimination by landlords such as Thomas, Baker, and Bubna, against unmarried cohabiting couples; and (b) the religiously motivated speech of landlords such as Thomas, Baker, and Bubna regarding refusal to rent to unmarried cohabiting couples.

7. This is a civil rights action for declaratory and injunctive relief pursuant to state and federal law, AS 22.10.020(c) and (g), and 42 U.S.C. § 1983, and is brought to (a) declare unconstitutional, as violating the Free Exercise Clause of the First Amendment to the United States Constitution, AERC's, MOA's, and Haley's enforcement of the Alaska and Anchorage anti-marital status discrimination laws, AS 18.80.220 and AMC 5.20.020, in such a way so as to require and compel religiously motivated residential landlords like Thomas, Baker, and Bubna, to rent property to unmarried cohabitors in violation of their sincere religious beliefs; (b) enjoin AERC's, MOA's, and Haley's enforcement of the Alaska and Anchorage anti-marital status discrimination laws, AS 18.80.220 and AMC 5.20.020, in such a way so as to require and compel religiously motivated residential

landlords like Thomas, Baker, and Bubna, to rent property to unmarried cohabiters in violation of their sincere religious beliefs; (c) declare the speech restriction provisions of these laws unconstitutional as violating the Free Speech Clause of the First Amendment to the United States Constitution; (d) declare the speech restriction provisions of these laws unconstitutional as violating the Free Speech section of the Alaska Constitution, Art. I Sec. 5; (e) enjoin AERC's, MOA's and Haley's enforcement of the speech restriction provisions of these laws; and (f) declare unconstitutional, as violating the Equal Protection Clause of the Fourteenth Amendment and the Equal Rights and Equal Protection Clauses of the Alaska Constitution, Art. I Sec. 1, the provisions and enforcement of the Alaska and Anchorage anti-marital status discrimination laws, AS 18.80.240 and AMC 5.20.020, which require and compel religiously motivated residential landlords like Thomas, Baker and Bubna to rent property to unmarried cohabitors without religious exception, but which make secular exceptions for landlords who wish to exclude unmarried cohabitors for non-religious reasons. This Court has jurisdiction over the subject matter of this action pursuant to, but not limited to, AS 22.10.020.

8. Venue in this action is appropriate in the Superior Court for the State of Alaska, Third Judicial District at Anchorage.

ALLEGATIONS COMMON TO ALL COUNTS

9. Thomas, Baker, and Bubna incorporate herein the allegations stated in ¶¶ 1-8 above.

10. Thomas, Baker, and Bubna are devoted members of the Christian faith. As Christians, Thomas's, Baker's

and Bubna's religious beliefs are founded upon the Bible which they sincerely believe to be the absolute, true, and infallible word of God.

11. As Christians, Thomas, Baker, and Bubna sincerely believe that (a) marriage is the only relationship, created by God, in which a man and a woman are to live together in sexual intimacy; (b) unmarried cohabitation, meaning a sexually intimate living arrangement between an unmarried man and woman, constitutes the sin for fornication and is grievously offensive to God; (c) they are commanded by God in his word, the Bible, particularly the Epistle of the Apostle Paul to the Romans chapter 13, to honor their government and its laws, and that civil disobedience to the law is another form of sin against God; (d) God would have them speak openly and honestly regarding their religious beliefs, including their religious beliefs regarding marriage and unmarried cohabitation, as well as their religiously motivated rental practices; and (e) if they were to assist or facilitate someone else's unmarried cohabitation, they would commit sin themselves, and render themselves hypocrites in the eyes of their families, children, and fellow Christians, and would render themselves ineligible for church leadership as an elder, deacon or deaconess.

12. Thomas's, Baker's, and Bubna's religious beliefs as referenced in ¶ 11 above are rooted in widely-held traditions within Christianity which extend back to the Old Testament and include the New Testament, the teachings of Christ, the teachings of the Apostle Paul, the teachings of the Apostle Peter, and the theology of the Reformation leader John Calvin. Thomas's, Baker's, and Bubna's religious beliefs as referenced above are sincere and central to their Christian faith.

13. Thomas jointly and individually owns rental properties in Anchorage, Alaska. Thomas conducts business as a landlord by renting his properties to residential tenants. Thomas's rental business is significantly impacted by his Christian faith because he sincerely believes that his faith is to be lived out in every aspect of his life. Thomas commits himself to practice his Christian beliefs in all aspects of his life, including his commercial activities as a landlord.

14. Baker jointly with her husband owns rental properties in Anchorage, Alaska. Baker conducts business as a landlord by renting her properties to residential tenants. Baker's rental business is significantly impacted by her Christian faith because she sincerely believes that her faith is to be lived out in every aspect of her life. Baker commits herself to practice her Christian beliefs in all aspects of her life, including her commercial activities as a landlord.

15. Bubna individually owns rental properties in Anchorage, Alaska. Bubna conducts business as a landlord, together with his wife, by renting his properties to residential tenants. Bubna's rental business is significantly impacted by his Christian faith because he sincerely believes that his faith is to be lived out in every aspect of his life. Bubna commits himself to practice his Christian beliefs in all aspects of his life, including his commercial activities as a landlord.

16. Thomas, Baker, and Bubna conduct their rental businesses without regard to race, religion, gender, and marital status. Thomas, Baker, and Bubna rent property to persons of all races, persons of all religions, persons of both genders, single persons, men and women married to

one another, separated and widowed persons, and single parents and grandparents. However, based solely upon their Christian beliefs as referenced above, Thomas, Baker, and Bubna will not rent their properties to unmarried couples who intend to cohabit, *i.e.*, live together in a sexual relationship outside the bonds of marriage. Thomas, Baker, and Bubna have in the past and recent past refused to rent property to unmarried couples who desired to cohabit in their properties. Thomas's, Baker's, and Bubna's conduct in refusing to rent to unmarried couples who intend to cohabit is religiously based.

17. Thomas, Baker, and Bubna have in the recent past attempted to communicate religiously motivated speech through ads printed in the Anchorage Daily News, limiting their rental of units consistent with their religious faith by excluding unmarried cohabiting couples. The landlords asked the Daily News to print ads with the limitation "no unmarried couples," but were informed that the paper would not print such ads because they are prohibited by laws. The landlords also desire to engage in other religiously motivated speech, whether with potential new tenants or other individuals, regarding their religiously motivated practices and preferences to decline rental to unmarried cohabiting couples, but are chilled in their ability to do so.

18. In the past, AERC, MOA and Haley, in her official capacity as Executive Director of the Commission, have substantially burdened the rights of Christian landlords who hold beliefs identical to those held by Thomas, Baker, and Bubna as described above. In particular, the AERC, by and for the MOA, and by work share agreement with the Commission, and Haley by and through the Commission, have substantially burdened the

religious rights of Christian landlords by acting to require and compel these landlords to rent residential property to unmarried cohabiting couples under AMC 5.20.020 and AS 18.80.240 in violation of the landlords' sincere religious beliefs. The AERC, MOA and Haley, in her official capacity as the Executive Director of the Commission, have substantially burdened the rights of the Christian landlords referenced above by initiating administrative and other legal proceedings against them, ordering their compliance with AERC, MOA, and Commission policies and interpretations of law requiring rental to unmarried cohabiters, and causing these landlords to incur substantial legal expense defending their religious rights. Based upon this past action, at present there is a real and imminent threat that the AERC, MOA, and/or Haley, in her official capacity as the Executive Director of the Commission, will act further to substantially burden the rights of other Christian landlords who hold beliefs identical to those described above, including but not limited to Thomas, Baker, and Bubna, by taking similar administrative and legal action against them. The real and immediate threat of such enforcement action, and the mere existence of these laws, presently substantially chills the rights of Thomas, Baker, and Bubna, and similarly situated landlords, to act in conformance with their sincerely held religious beliefs.

19. The laws at issue unconstitutionally prohibit Thomas, Baker, and Bubna from engaging in religiously motivated speech, by (a) inquiring of the marital status of any of their potential tenants; (b) advertising their rental units pursuant to their religiously motivated rental practices and policies; (c) offering their rental units for let without making them available to unmarried cohabitors; and/or (d) making any communication or statement which

indicates a preference against renting to unmarried cohabitors, to anyone in any context. Thomas, Baker, and Bubna always inquire of their potential tenants' marital status, they always offer their units for let without making them available to unmarried cohabitors, they often communicate in multiple contexts their religiously based preferences against renting to unmarried cohabitors, and they would advertise their units consistent with their religiously based rental practices if they were allowed to do so by law. As referenced above, the landlords have been denied the right to advertise consistent with their religious beliefs, because the local newspaper will not print ads limiting rental so as to exclude unmarried cohabiting couples while the laws at issue are in effect.

20. Thomas, Baker, and Bubna are placed into a hard position by the laws at issue in this action, because there is no way for them to remain in the residential rental business and both obey the law and abide by their religious beliefs regarding marriage and cohabitation. If Thomas, Baker, and Bubna obey the laws, then they must violate their religious beliefs related to marriage, cohabitation, facilitating cohabitation, and religiously motivated speech. If Thomas, Baker, and Bubna disobey the laws, then they violate their religious beliefs regarding honoring their government and its laws. Because of the laws at issue, public newspapers, including but not limited to the Anchorage Daily News, will not print advertisements which contain restrictions against rental to unmarried cohabitors.

21. The laws at issue both contain gaping secular exceptions which allow the very form of "marital status" discrimination that the laws are supposedly designed to prevent. The state statute allows landlords for secular

reasons to classify their property as being housing for "married couples" only and thus to exclude and discriminate against all singles, including unmarried cohabitors. The municipal ordinance allows a landlord to discriminate against all singles, including unmarried cohabitors, if the landlord shares common living space with the tenants. Neither law, however, contains even the slightest exception for a religiously motivated landlord who wishes to exclude unmarried cohabiters for religious reasons.

22. The acts and policies of the Defendants AERC, MOA and Haley, in her official capacity as the Executive Director of the Commission, were, are, and will be taken, performed, and/or issued under color of state law, and therefore constitute actions of the State within the meaning of the Fourteenth Amendment of the United States Constitution.

COUNT I

UNCONSTITUTIONAL INFRINGEMENT OF THE FREE EXERCISE OF RELIGION

23. Thomas, Baker, and Bubna incorporate herein by reference the allegations stated in ¶¶ 1-22 above.

24. AERC's, MOA's and Haley's conduct in previously acting to require and compel, and threatening in the future to require and compel Christian landlords to rent residential property to unmarried cohabiting couples, substantially burdens the Bakers' rights to the free exercise of religion as protected by the First Amendment. The laws, even absent enforcement, burden Thomas's, Baker's, and Bubna's hybrid constitutional rights, including the rights to free exercise of religion, free speech, property ownership, occupational liberty, and equal protection. The

laws are not generally applicable and they discriminate on the basis of religion. The laws chill Thomas's, Bakers, and Bubna's rights to the free exercise of religion protected by the First Amendment. Defendants have no compelling justification to support these laws, and these laws are not the least restrictive means of achieving a legitimate government interest.

25. Unless AERC, MOA and Haley are enjoined and restrained by this Court from enforcing the laws referenced above in the manner referenced above, and unless the laws referenced above are declared unconstitutional, Thomas, Baker, Bubna, and similarly situated landlords like them, will suffer irreparable harm for which there is no adequate remedy at law.

COUNT 2

OVERRULING OF SWANNER V. ANCHORAGE EQUAL RIGHTS COMMISSION, 874 P.2d 274 (Alaska 1994)

26. Thomas, Baker and Bubna incorporate herein their allegations stated in ¶¶ 1-25 above.

27. In 1994 the Alaska Supreme Court decided *Swanner v. Anchorage Equal Rights Commission*, 874 P.2d 274 (Alaska 1994). In that opinion, the Alaska Supreme Court rejected Mr. Swanner's First Amendment free exercise claim challenging the laws at issue in this case. Mr. Swanner was a landlord virtually identical to Thomas, Baker and Bubna.

28. The Alaska Supreme Court did not address in *Swanner*, because it was not asked by the parties to address, the hybrid rights doctrine of *Employment Division v. Smith*,

494 U.S. 872 (1990) or the lack of general applicability of the local laws at issue.

29. The Alaska Supreme Court incorrectly analyzed and resolved the federal compelling government interest test in *Swanner.* This incorrect analysis and resolution has since 1994 been identified and declared by five (5) federal judges as of this date, including United States Supreme Court Justice Clarence Thomas; Ninth Circuit Justices O'Scannlain, Ferris and Kleinfeld, and United States District Court Judge H. Russell Holland.

30. Thomas, Baker and Bubna understand that lower Alaska Courts are bound by the rule of *Swanner*, but they respectfully ask that the holding of *Swanner* be overruled by the Alaska Supreme Court upon an appeal from judgment in this action.

31. Thomas, Baker, and Bubna have a good faith basis upon which to request that the ruling of *Swanner* regarding federal constitutional questions be overturned based upon the opinions of the five (5) federal judges referenced in ¶ 29 above.

COUNT 3

BURDEN OF THOMAS'S, BAKER'S, AND BUBNA'S RIGHTS TO FREE SPEECH UNDER THE UNITED STATES AND ALASKA CONSTITUTIONS

32. Thomas, Baker and Bubna incorporate herein by reference the allegations stated in ¶¶ 1-25 above.

33. The speech provisions of the laws at issue are unconstitutional in that they violate the free speech clause of the First Amendment and the Free Speech Clause of the

Alaska Constitution, Art. I Sec. 5. The laws infringe and chill religiously motivated speech, and they are unconstitutionally vague and over-broad. Thomas, Baker and Bubna, have been denied the right to free religiously motivated speech as of this date.

COUNT 4

DENIAL OF EQUAL PROTECTION AND EQUAL RIGHTS UNDER THE UNITED STATES AND ALASKA CONSTITUTIONS

34. Thomas, Baker and Bubna incorporate herein by reference the allegations stated in ¶¶ 1-25 above.

35. The laws at issue both contain gaping secular exceptions which allow the very form of "marital status" discrimination that the laws are supposedly designed to prevent. The state statute allows landlords for secular reasons to classify their property as being housing for "married couples" only and thus to exclude and discriminate against all singles, including unmarried cohabitors. The municipal ordinance allows a landlord to discriminate against all singles, including unmarried cohabitors, if the landlord shares common living space with the tenants. Neither law, however, contains even the slightest exception for a religiously motivated landlord who wishes to exclude unmarried cohabitors for religious reasons.

36. Because the laws at issue contain gaping secular exceptions which allow landlords for secular reasons to discriminate against all singles including unmarried cohabiters, but deny any religious exception to religiously motivated landlords, the laws discriminate against and/or have a disparate impact upon religiously motivated landlords and thus deny religiously motivated landlords

like Thomas, Baker, and Bubna equal protection of the law under the Fourteenth Amendment to the United States Constitution and equal rights and equal protection under Art. I Sec. 1 of the Alaska Constitution.

WHEREFORE, Thomas, Baker and Bubna pray that this Court enter judgment in their favor and against AERC, MOA, and Haley, in her official capacity as the Executive Director of the Commission, as follows:

1. For a declaration issued pursuant to AS 22.10.020(g) and 42 U.S.C. § 1983 that AERC's, MOA's and Haley's enforcement of AS 18.80.020 and AMC 5.20.020 against religiously motivated landlords like Thomas, Baker and Bubna is unconstitutional and unlawful pursuant to the First and Fourteenth Amendments to the United States Constitution;

2. For an order and decree overruling *Swanner v. Anchorage Equal Rights Comm'n*, 874 P.2d 274 (Alaska 1994) and declaring AS 18.80.240 and AMC 520.020 unconstitutional under the First and fourteenth Amendments to the United States Constitution to the extent that those laws require landlords to rent residential property to unmarried cohabiting couples in contravention of the landlord's sincere religious objections;

3. For a declaration that the speech provisions of AS 18.80.240 and AMC 5.20.020 are unconstitutional in violation of the Free Speech Clause of the First Amendment to the United States Constitution and in violation of the Free Speech Clause of the Alaska Constitution, Art. I Sec. 5;

4. For a declaration that AS 18.80.240 and AMC 5.20.020 are unconstitutional in violation of the Equal

Protection Clause of the Fourteenth Amendment to the United States Constitution and the Equal Rights and Equal Protection Clauses of the Alaska Constitution, Art. I Sec. 1.

5. For an order and decree permanently enjoining the AERC, MOA and Haley, in her official capacity as the Executive Director of the Commission, from enforcing the laws referenced above in the manner referenced above against religiously motivated landlords like Thomas, Baker and Bubna;

6. For an award of costs and attorneys' fees incurred pursuant to applicable law, including but not limited to, Alaska's law regarding public interest litigation and/or 42 U.S.C. § 1988; and

7. For such other and further relief as the Court deems just and appropriate.

DATED this 7th day of September, 2001.

BRENA, BELL & CLARKSON, P.C.
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